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COURT OF APPEALS
DIVISION II

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SUPERIOR COURT NO. 95-1-415-9
COURT OF APPEALS NO. 47251-1-II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent.

Vs.

BRIAN M. BASSETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY
The Honorable David Edwards Judge

APPELLANT'S RESPONSE TO SUPPLEMENTAL BRIEF

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I. SUPPLEMENTAL STATEMENT OF THE CASE

In 1996, shortly after he turned 16-years old, Brian Bassett was sentenced to mandatory life in prison without parole for the deaths of his parents and younger brother.¹ (*State v. Bassett*, 95-1-415-9.)

In 2015, as a result of a decade long series of U.S. Supreme Court decisions that altered the constitutionality of sentencing juvenile offenders to life in prison, Mr. Bassett received a new sentencing hearing.²

During his re-sentencing hearing Mr. Bassett presented evidence in mitigation of his crime as well as evidence that demonstrated he had already made consistent, positive, and significant progress towards rehabilitation, and that supported the proposition that his rehabilitation would continue to advance in the future. See footnote 3, *infra.*; also, Brief of Appellant, p. 22-47. The prosecutor did not present any evidence or testimony in opposition to either the mitigating evidence presented or the evidence demonstrating the high likelihood Mr. Bassett would continue his journey

¹ Brian McDonald, an older co-defendant who confessed to actually having killed Mr. Bassett's brother, was also charged in the three crimes. See, *State v. McDonald*, 138 Wn.2d 680 (1998).

² E.g., *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (banning imposition of the death penalty for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010) (banning mandatory life without parole sentences juvenile offenders convicted of non-homicide crimes); *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) (banning mandatory juvenile life without parole sentences). See also, RCW 10.95.030, the statute under which Mr. Bassett had originally been sentenced, amended in an effort to comply with *Miller*.

towards rehabilitation. RP 1-30-15, p. 51.³ Nonetheless, Mr. Bassett's sentencing judge imposed the same life without parole sentence he'd received almost 20 years earlier before the *Miller* decision. Mr. Bassett appealed.

On January 25, 2016, the U.S. Supreme Court, continuing its decade long journey towards curtailing juvenile life without parole sentences, issued *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016). *Montgomery*, through its broad interpretation of *Miller*, resulted in a “heretofore unknown constitutional standard” in juvenile life in prison sentencing. *State v. Valencia*, 239 Ariz. 255, 370 P. 3d 124, 128 (Ariz. Ct. App. 2016); see, also, footnote 6, *infra*. .

Two months after the *Montgomery* decision, the Respondent filed its response to Mr. Bassett's opening brief. The Respondent failed to address *Montgomery's* effects as well as several other significant issues raised in Mr. Bassett's brief. See e.g. Reply of Appellant, p. 5-7. Similarly, during oral argument on September 19, 2016, the Respondent failed to

³ At his sentencing, Mr. Bassett presented evidence that, although he was in prison without hope of release, he had been baptized and regularly attended church, (RP 22-23); he had earned his GED, (CP 190-91), and continued with his post-high school education, earning a place on the honor roll at Edmonds Community College. (CP 195.) He earned certifications in Carpentry, Plumbing and HVAC Maintenance, establishing an ability to support himself if ever released. (CP 232.) He voluntarily enrolled in and completed several classes designed to help him understand the dynamics of violence that may have contributed to the crimes he'd committed as an adolescent. (CP 279, 207.) He served as a mentor to other inmates. (CP 263-29) (letters of support for Mr. Bassett). He met and married a wonderful woman. (RP 19-27.) Mr. Bassett had not violated a single prison rule in the 12 years prior to his re-sentencing hearing (CP 207) and, despite the fact he had been convicted of murder and was serving a life without parole sentence, the DOC classified Mr. Bassett as a moderate to low security risk. (CP 188, RP 1-30-15, p. 29.)

address why the sentencing standard made clear by *Montgomery* should not apply in Washington, or, specifically, to Mr. Bassett.⁴

On September 22, 2016, three days after oral argument, the Court of Appeals provided the prosecutor with another opportunity to respond to an issue raised ten months earlier by the Appellant in his opening brief – namely, whether juvenile life in prison without parole violates the constitutional prohibition against cruel (and unusual) punishment. See, Order Requiring Supplemental Briefing, 9-22-16. When the Respondent failed to file a supplemental brief by the date ordered by the Court, the Court, *sua sponte*, extended the Respondent's deadline two more weeks.

II. SUPPLEMENTAL ARGUMENT IN REPLY

A. A sentence of juvenile life in prison without parole violates the constitutional prohibition against cruel and unusual punishment:

Earlier this year, the Supreme Court of Iowa, interpreting a standard in its state constitution identical to the standard used in the federal constitution, banned life in prison for juvenile offenders as unconstitution-

⁴ To date, the evidence presented at Mr. Bassett's sentencing that established he is not "permanently incorrigible," has not been refuted or contradicted by any evidence, testimony or argument before either Mr. Bassett's sentencing court or this Court. Though when pronouncing his life sentence Mr. Bassett's sentencer announced he should never be released into the community, (RP 1-30-15, p. 93), that remark was made in the context of, and focusing on, the unpleasant facts surrounding the crime. But the Supreme Court has recognized that it is improper for a sentencer to base a juvenile life sentence on the nature of even gruesome facts of the crimes at issue. See, *Graham*, 560 U.S. at 78; also, *Roper*, 543 U.S. at 570.

ally cruel and unusual punishment. *State v. Sweet*, 879 N.W. 2d 811 (Iowa, 2016).⁵ For the reasons noted herein and in the Brief of Appellant at p. 7-18, Washington should do the same.

The Respondent asserts in its Supplemental Brief that, "...there is no federal authority that would indicate that RCW 10.95.030 is in violation of the Eighth Amendment." Supp. Br. Resp. p. 2. That assertion is incorrect. In fact, *Montgomery*, clarifying *Miller*, provides that as a precondition to imposing a juvenile life without parole sentence, a sentencing court must first conclude the particular child is "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery* at 7333-36.⁶ Section RCW 10.95.030, the statute used to sentence Mr. Bassett, did not require a sentencing court to make any finding that a juvenile is "permanently incorrigible" before imposing a juvenile life without parole sentence. Without that requirement, according to *Montgomery*, imposition of life without parole is an unconstitutionally

⁵ Compare, Iowa Const. Article I, Section 17 declaring that "cruel and unusual punishment shall not be inflicted" with U.S. Const, Amend VIII, "...nor cruel and unusual punishments inflicted."

⁶ Accord, *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (juvenile life sentence is cruel and unusual punishment when sentencing court failed to make a "distinct determination" of "permanent incorrigibility"); *State v. Valencia*, 370 P.3d 124, 127 (Ariz. Ct. App. 2016) (juvenile life sentence where court failed to make a finding of "permanent incorrigibility" is cruel and unusual punishment); *Landrum v. State*, 192 So. 3d 459, 463 (Fla. 2016) (same); *People v. Nieto*, 52 N.E.3d 442, 455 (Ill. App. Ct. 2016) (vacating a juvenile life sentence in part, because sentencing judge did not make findings that defendant was "permanently incorrigible").

disproportionate punishment for juvenile offenders and constitutes cruel and unusual punishment.

B. Juvenile life in prison without parole violates Washington's constitutional prohibition against "cruel punishment."

Article I, Section 14 of Washington's Constitution contains its own distinct prohibition against "cruel punishment," providing "excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." WASH Const. Art. 1, §14. Despite a longstanding recognition of the differences between the standard utilized in the Eighth Amendment and that utilized in Article I, Section 14, the Respondent asks this court to overlook those differences. The Respondent apparently reasons that, because the language used in the U.S. and Washington Constitutions is "almost identical," (Supp. Br. Resp. p. 6-7) for a punishment to be constitutionally disproportionate in Washington requires it be both "cruel and unusual." (Supp. Br. of Resp. p. 3.) However, the framers of our state constitution considered and rejected the language used in the Eighth Amendment in favor of Washington's "cruel punishment" standard. *State v. Fain*, 94 Wn.2d 387, 393 (1980) (citing Journal of the Washington State Constitutional Convention: 1859, 501-02 (B. Rosenow ed. 1962)).

Consistent with the differences in text and history, Washington's Supreme Court has held that the difference in terminology is significant

and that Article I, Section 14 provides an even greater protection against cruel punishment than its federal counterpart. *State v. Thorne*, 129 Wn.2d 736, 772 (1996); *State v. Fain*, 94 Wn.2d at 393; see also, *State v. Roberts*, 142 Wn.2d 471, 506 n. 11 (2000). In short, a punishment acceptable under the federal constitutional standard may not pass muster under Washington's constitutional standard.

1. Societal standards of decency favor banning juvenile life:

The prosecutor, relying on data contained in the Brief of Appellant, argues that, because after *Miller* only 14 states functionally abandoned juvenile life as a sentence, Washington's continued use of juvenile life without parole as a sentence remains justified. (Supp. Br. Resp. 5.) However, the Respondent misses the point. First, in the year since the appellant filed his brief, the number of states that either abolished or functionally abandoned juvenile life has increased to 23.⁷ Second, when determining the viability of juvenile life as a sentence, “[i]t is not so much the number of these states that is significant, but the consistency of the direction of change.” See, *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). The direction of change in this country is unmistakably and steadily mov-

⁷ See, <http://fairsentencingofyouth.org/wp-content/uploads/2012/09/Straight-abolition-map-w-2nd-category-June2016.png> (last viewed Oct. 2016); also, The Louisiana House and Senate have each recently voted overwhelmingly to abolish juvenile life without parole. H.B. 264, 2016 Reg. Sess. (La 2016).

ing towards abandoning the practice of putting child offenders in prison for their entire lives.

Although the constitutional prohibition against imposing cruel punishment holds constant across generations, “its applicability must change as the basic mores of society change.” *Kennedy v. Louisiana*, 554 U.S. 417, 419 (2008); *Miller*, 567 U.S. ___, 132 S. Ct. at 2463 (“proportionality” of a given punishment is a concept that changes with “evolving standards of decency that mark the progress of a maturing society”). As noted in the *Roper*, *Graham*, *Miller* and *Montgomery* decisions, that the brain and emotional development of juvenile offenders is significantly different from those of an adult is an accepted fact. Reflective of that fact and evolving standards of decency, what had been an acceptable mores of society - sentencing juvenile offenders to die in prison – is no longer readily accepted even, as the *Sweet* case recently illustrates, using the less protective federal “cruel and unusual punishment” standard.

Without question, by judicial interpretation of its own constitution, a state may grant its citizens broader protections than the federal constitution requires. *Danforth v. Minnesota*, 522 U.S. 264, 268 (2008) (citation omitted). Washington has done just that. When applying the broader protections afforded children in Washington under Article I, Section 14, and in recognition of evolved standards of what society accepts as “decent,”

there is little question that a sentence requiring a person to die in prison for a crime they committed as a child is disproportionately cruel under Washington's constitution.

2. A juvenile life without parole sentence is now unworkable in Washington: Aside from the fact that evolving societal standards of decency counsel against sentencing juvenile offenders to die in prison, based on the standard announced in *Montgomery* and the broader protections provided under Article I, Section 14, maintaining juvenile life without parole is a practical impossibility in Washington.

The Respondent accurately observes that, *Montgomery* - applying a federal constitutional standard - did not technically ban juvenile life without parole. (Br. Resp., p. 2.) However, by clarifying the requirement that a sentencing court make a finding that a juvenile is “permanently incorrigible” as a precursor to imposition of a juvenile life sentence, *Montgomery* created a standard that is unworkable, especially under Washington's broader constitutional protection against cruel punishment.

Montgomery alluded that a conclusive showing of traits such as “permanent incorrigibility” can never be made with integrity about juveniles - even utilizing an individualized hearing to determine whether life without parole should be imposed on a juvenile convicted of homicide. Asking a sentencing court to make a finding that a child offender is “per-

manently incorrigible” requires the court to make a forward-looking prediction that the child being sentenced will not experience meaningful, positive change at some future point in his or her lifetime. Concurrently, the U.S. Supreme Court has declared that, because juveniles are still forming their very identities, they have a “greater capacity for change” than do adults, making the prediction as to which children will change and which will end up “permanently incorrigible” all but impossible.⁸ See, *Roper*, 543 U.S. at 570, *Graham*, 560 U.S. at 74; *Miller*, 132 S. Ct. at 2465. It necessarily follows that a judge cannot ascertain with any reasonable degree of certainty whether imposition of life in prison without parole - the adult equivalent of a death sentence - should be imposed against a particular juvenile. And, as *Montgomery* notes, imposition of a juvenile life in prison sentence without a clear finding that the particular juvenile is permanently incorrigible, is constitutionally disproportionate, and, therefore, cruel punishment.

Mr. Bassett's case illustrates the practical impossibility of sentencing a juvenile offender to life without parole in light of the greater constitutional protection Washington provides against cruel punishment. As

⁸ Dr. Robert Hansen, a psychologist treating Mr. Bassett in the months prior to the homicides, testified during Mr. Bassett's sentencing that during the period that encompassed the homicides, Mr. Bassett was still struggling to find his identity. RP 1-30-15, p. 39-42, 46.

noted above, the only evidence received by Mr. Bassett's sentencing court demonstrated Mr. Bassett was not "permanently incorrigible." That evidence established that for 12 straight years Mr. Bassett had been trying to improve himself and make a positive contribution to his community. Imposing a life without parole sentence on a juvenile offender who, like Mr. Bassett, appears to have turned his life around, is not what *Miller* and *Montgomery* contemplated as an example of one of the "extraordinarily rare," "permanently incorrigible" juvenile offenders for whom life in prison is the proper place. In light of *Montgomery*, Article I, Section 14, and all Mr. Bassett had accomplished, sentencing Mr. Bassett to life without parole was not just an abuse of discretion, it was disproportionately cruel.

Rather than place Washington judges in what is, likely, an unworkable situation in light of the demands of *Montgomery* and the broad constitutional protections afforded by Article I, Section 14, the practice of sentencing juvenile offenders to prison for life should be abandoned in Washington as unconstitutional.

Respectfully submitted this 4th day of November 2016.

Eric W. Lindell

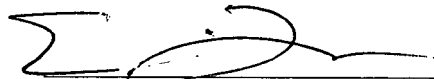
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DATED this 4th day of November 2016.



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